INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	3
Argument	5
Conclusion	11

CITATIONS

Cases:	
Abbate v. *United States*, 359 U.S. 187	10
Brinegar v. *United States*, 338 U.S. 160	10
Carroll v. *United States*, 267 U.S. 132	10
Casey v. *United States*, 276 U.S. 413	6
Hirabayashi v. *United States*, 320 U.S. 81	11
Lawn v. *United States*, 355 U.S. 339	11
Petite v. *United States*, 361 U.S. 529	10
Sonzinsky v. *United States*, 300 U.S. 506	6
Yee Hem v. *United States*, 268 U.S. 178	6
Statutes:	
National Firearms Act:	
26 U.S.C. 5811(a)	2
26 U.S.C. 5841	2
26 U.S.C. 5851	3, 5, 6
Miscellaneous:	
Rev. Rul. 55–529, 1955–2 Cum. Bull. 482	7
Rev. Rul. 56–29, 1956–1 Cum. Bull. 552	7
Statement of Attorney General Homer S. Cummings, Hearings before the House Committee on Ways and Means on H.R. 9066, 73d Cong., 2d Sess., pp. 8–9	6

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 262

STOY DECKER AND ROBERT MATTHEW COX, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 19–23) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1961. The petition for a writ of certiorari was filed on July 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners, who were convicted of possessing an illegally transferred firearm, have standing to complain of the constitutionality of a provision of the statute making possession sufficient evidence to

authorize a conviction unless explained by the defendant to the satisfaction of the jury, where the conviction did not rest upon this provision but upon adequate independent proof of all elements of the offense.

2. Whether, in any event, the statutory provision making possession sufficient to support a conviction, unless explained by the defendant, is valid.

3. Whether the government was precluded from introducing evidence to show that the weapon involved was a firearm within the meaning of the National Firearms Act because the Treasury Department had ruled that a later modified model of the weapon was not such a firearm.

4. Whether the district court properly denied a motion to suppress evidence seized in the course of a lawful arrest.

5. Whether a federal prosecution for possessing an illegally transferred firearm and for conspiracy constitutes double jeopardy after a state conviction of assault, with intent to do great bodily harm, based on the events in which the firearm was used.

6. Whether there was error in the cross-examination of one of the petitioners.

STATUTES INVOLVED

26 U.S.C. 5811(a):

> There shall be levied, collected, and paid on firearms transferred in the United States a tax at the rate of $200 for each firearm: * * *

26 U.S.C. 5841:

> Every person possessing a firearm shall register, with the Secretary or his delegate, the

number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with.

26 U.S.C. 5851:

It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

STATEMENT

The first count of an indictment returned in the District Court for the Western District of Kentucky charged petitioners and Floyd Guinn with conspiracy to possess an unregistered firearm which had been transferred in violation of law. Counts 2 and 3

charged petitioners Decker and Cox, respectively, with the substantive offense of possession of a firearm which had been transferred in violation of 26 U.S.C. 5811 (P.A. 7–9).[1] Petitioners were convicted after a jury trial and they were each sentenced to imprisonment for five years on count 1 (the conspiracy count) and to imprisonment for five years and to pay a fine of $2,000 for the substantive offense, the sentences to run concurrently (P.A. 3).[2]

The evidence may be summarized as follows:

On November 10, 1958, in Louisville, Kentucky, petitioners and others assaulted one Lloyd Alexander. Cox fired the weapon involved, described as a tear gas gun, in the victim's face and shortly thereafter gave the weapon to Decker. Decker and Guinn were arrested by city police officers as they fled from the area in a car. The weapon was found by the police under the seat where Decker had been riding. At the trial, Cox admitted ownership and possession of the weapon (Pet. 7, 20).[3]

There was no question that the weapon had not been registered with the Secretary of the Treasury and had been transferred without payment of the tax required by the National Firearms Act (Pet. 19–20). Thurmond W. Darr, Chief of the Firearms Section,

[1] The record on file with the Clerk consists of the appendices to the briefs filed in the court of appeals. Petitioner's appendix will be designated herein as "P.A." and the government's as "G.A.".

[2] Guinn was acquitted by the court (P.A. 2).

[3] These facts are not reflected in the partial transcript or the appendices filed in this Court but were undisputed in the court below (see Pet. 20).

Internal Revenue Service, and Marion E. Williams, a Federal Bureau of Investigation ballistics expert, test-fired the weapon on September 28, 1960, using commercial ammunition (a 410 gauge shotgun shell), without any damage to its structure (G.A. 3–7). Darr testified that as a result of the test it "is the position of the Internal Revenue Service that the tear gas pen gun, G2576, that we test-fired is a firearm under the National Firearms Act in 'Any Other Weapon' category" (G.A. 7). There was also testimony that petitioner Cox had stated some time in 1957 that he had fired a "410 gauge shotgun shell in a tear gas pistol and the recoil of it almost tore his hand off" (G.A. 18).

The weapon was one of a type known as a Model 40 tear gas pen gun, which the Treasury Department had originally decided was a firearm under the National Firearms Act because it was capable of firing fixed ammunition without exploding. This type of gun was subsequently modified by the manufacturer by placing grooves in the barrel, causing it to explode when fired with ammunition (G.A. 10–11). Since this altered version, as distinguished from the weapon involved in this case and the original model, would not fire fixed ammunition, the Treasury Department, on March 30, 1956, ruled that it was not subject to the provisions of the statute (P.A. 40; G.A. 11).

ARGUMENT

1. The statute (26 U.S.C. 5851, *supra*, p. 3) provides that it shall be unlawful for any person to receive or possess any firearm which has at any time

been transferred in violation of Section 5811, *i.e.*, without payment of the transfer tax of $200. Section 5851 also provides that when "the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury".

Petitioners contend (Pet. 9–10) that this latter provision is unconstitutional because it "sets no standards by which a jury shall determine what is a satisfactory explanation" and because it places the burden of proof upon the defendant and requires him to give evidence against himself. These arguments, not raised in the district court, are without merit. In the first place, the charge here was possession of an unregistered firearm on which the transfer tax had not been paid; there was no question that the weapon had been transferred without payment of the tax, and the evidence affirmatively showed petitioners' knowing possession of the gun. No more need be proved for this offense. The convictions, therefore, do not rest upon the provision claimed to be invalid. Secondly, there is no constitutional infirmity in this type of provision. *Yee Hem* v. *United States*, 268 U.S. 178; *Casey* v. *United States*, 276 U.S. 413.[4]

[4] In *Sonzinsky* v. *United States*, 300 U.S. 506, this Court held that the National Firearms Act is a valid exercise of the taxing power of Congress. The provision making possession *prima facie* evidence of guilt follows the language of the Narcotic Drug Act of 1909 which was sustained in the *Yee Hem* case, *supra*, over precisely the same objections as petitioners make here. See Statement of Attorney General Homer S. Cummings, Hearings before the House Committee on Ways and Means on H.R. 9066, 73d Cong., 2d Sess., pp. 8–9.

2. Petitioners do not deny that a weapon such as the one involved here is a firearm subject to the provisions of the statute if it is capable (as it was) of firing fixed ammunition without exploding.[3] They contend (Pet. 12–17) that no tax was due when the gun was transferred because the Treasury Department had ruled that a gun of the same model number was not a firearm, and that they were therefore subjected to an *ex post facto* application of the statute. They do not argue that they relied upon the ruling in acquiring the gun. Petitioner Cox is in no position to complain on this score, for there was evidence that he had himself fired fixed ammunition from the gun (*supra*, p. 5).

In any event, the contention is based upon a misconception of the facts. The gun petitioners possessed was one of an original model which had never been determined not to be a firearm. On the contrary, the manufacturer was informed by the Treasury Department that this model was a firearm. Subsequently, the manufacturer modified the model by placing grooves in the barrel, causing it to explode when fired with fixed ammunition (G.A. 11). It was this modified model that was the subject of the determinations upon which petitioners rely (see p. 5, *supra*).

[3] The Treasury Department classifies such tear gas firing devices as firearms if they are capable of firing fixed metallic cartridges in shotgun shells. If they are not capable of firing such ammunition, they are not considered to be firearms. Rev. Rul. 55–529, 1955–2 Cum. Bull. 482 (G.A. 20); Rev. Rul. 56–29, 1956–1 Cum. Bull. 552 (G.A. 21).

Moreover, a determination by the Treasury Department is not a prerequisite to the application of the statute. If a device is a firearm, there must be compliance. Otherwise no device would be within the coverage of the Act without a prior administrative ruling—a prerequisite which Congress did not impose. As the court of appeals held, it was not necessary to prove that petitioners knew the weapon was a firearm under the statute, if they knew (as they did) what it physically was (Pet. 21).

3. Before trial, petitioners moved to suppress the gun as evidence. They contend that the district court erred in denying the motion (Pet. 12). Only the findings of fact and conclusions of law of the district court were made part of the record on appeal; the evidence adduced at the hearing on the motion was not transcribed. Accordingly, the findings cannot be questioned. The court found that the local police officers were informed by radio that a gas gun had been used in a fight in a bar. When they arrived on the scene, the owner of the bar, a former police officer, pointed to a car leaving the area, told the officers the men who were in the fight were in it, and gave them the license number. In their pursuit, the officers saw the car weaving from side to side. As they were stopping it, they saw petitioner Decker bend over in his position in the right front seat. Guinn was driving. Both were intoxicated. They were taken in their car to the hospital where the victim of the assault had been removed for treatment. Guinn testified that he and Decker voluntarily went with the officers. At the hospital, after verifying the

information that a person had been shot with a gas gun, the officers questioned the two men. They denied that they were involved in the fight and denied knowing anything about a gas gun. They were placed under arrest for drunkenness. After searching them in the entrance or vestibule of the hospital, one of the officers went to their car, which was parked about twenty or twenty-five feet from the entrance, searched it, and found the gun, a hunting knife, and a partially filled bottle of whiskey. On these facts, the district court held that the search was a lawful incident of a lawful arrest (P.A. 18–20) and its ruling was sustained by the court of appeals (Pet. 22).

There can hardly be any question as to the validity of the arrests. Guinn and Decker were fleeing in their car from the scene of the fight, the owner of the bar identified them to the officers as participants, their car was weaving in the street, and the officers saw Decker bend over in his seat when the car was brought to a stop. It was entirely reasonable for the officers to take the men to the hospital to verify the information they had received that a man had been shot with a gas gun. In these circumstances, there was ample probable cause for the arrests. And in the light of the positive information the officers then had as to the shooting and their prior observations of Decker's movements in the car when they stopped it, they had reason to believe that the gun used in the fight was secreted in the car standing nearby. They were therefore justified in searching the car, both for their own self-protection and to find the instrumentality of the

offense. Cf. *Brinegar* v. *United States*, 338 U.S. 160; *Carroll v. United States*, 267 U.S. 132.

4. Contrary to petitioners' contention (Pet. 11), no double jeopardy is involved in this federal prosecution following upon their conviction in a state court, with others, of conspiracy to do bodily harm to the victim of the assault (see Pet. 6). *Abbate* v. *United States*, 359 U.S. 187. Obviously, a conspiracy to do bodily harm to a person is one thing; illegal possession of a gun in violation of the National Firearms Act is quite another.[6]

5. Petitioners contend generally (Pet. 10–11) that the trial court erred in permitting government counsel, in cross-examining them, to refer to "testimony in a state court case in an effort to contradict the witness." They cite only one question put to petitioner Decker concerning his testimony "in state court" that he had the gun after petitioner Cox had testified in the same proceeding that he had turned it over to Decker (Pet. 8; P.A. 45).[7] We fail to see any impropriety in such questions. Petitioners were subject to cross-examination on the basis of their prior state-

[6] By the same token, this prosecution is entirely consistent with the policy of the Department of Justice against duplicating federal-state prosecutions. See *Petite* v. *United States*, 361 U.S. 529, 531. The two prosecutions involved here did not arise out of the same transaction; the state offense merely revealed the fact that petitioners possessed an unregistered firearm in violation of the federal statute.

[7] In connection with this contention, petitioners also refer a question put to petitioner Decker concerning his disposition of $1,500, and government counsel's reference to a "special fund that came down from Jimmy Hoffa" (Pet. 11; P.A. 44). But, as petitioners themselves acknowledge (Pet. 11), the trial court ruled that this line of questioning had nothing to do with "this case" and accordingly sustained their objection (P.A. 44–45).

ments, whether they were made in or out of court. The reference to the "state court" only served to identify the statement to which government counsel was referring. The nature of the proceeding in the state court was not mentioned (cf. Pet. 8).*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
ROBERT S. ERDAHL,
SIDNEY M. GLAZER,
Attorneys.

AUGUST 1961.

---

* Petitioners also assert, without supporting argument, that they could not be guilty of both a conspiracy and the substantive offense, in view of petitioner Cox's admission that he owned and possessed the gun, and that it is not possible to conspire to violate the National Firearms Act as charged in the indictment (Pet. 2, 18). Apart from the fact that these contentions are frivolous as we understand them, we point out that petitioners' sentences on the conspiracy count are concurrent with the sentences on the substantive counts. Hence, any infirmity in the former is of no consequence. *Lawn* v. *United States*, 355 U.S. 339, 359; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

U.S. GOVERNMENT PRINTING OFFICE 1961